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THE PELATIAH WEBSTER MYTH.

FOR several years Mr. Hannis TAYLOR has been endeavoring to persuade the American public that the Constitution, instead of being the work of the Convention of 1787, acting under the guidance of men like MADISON, HAMILTON, PINCKNEY, PATTERSON, ELLSWORTH, and others of similar caliber, was really the invention of a single individual, Pelatiah WEBSTER by name, whose fame, till Mr. TAYLOR's resurrection of it in THE NORTH AMERICAN REVIEW for August, 1907, had dropped quite out of historical notice. Since this first publication of his discovery, Mr. TAYLOR has returned to the attack time and time again, now in a memorial to Congress urging some sort of national recognition of WEBSTER's services, now in a volume on "JURISPRUDENCE," again in an imposing work on "THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION," and more recently, and compendiously, in the NEW YORK EVENING POST of January 10th last, where he attempts to answer Mr. Gaillard HUNT's very pointed criticism in an earlier issue (December 30, 1911) of the same journal, of his method of handling historical evidence in one or two instances. Thus if asseveration and reiteration could establish the truth of history, Mr. TAYLOR would by this time have put his thesis beyond all question. But has he in fact succeeded in doing so? This is the subject of our inquiry.

First, a word as to the documents involved. For the most part, I shall quote from Mr. TAYLOR's latest statement of his case, in the EVENING POST article. But this case in turn is based upon a document. For, as Mr. TAYLOR reminds us, in the language of M. LANGLOIS, "History is studied from documents. * * * There is no substitute for documents; no documents, no history." Accordingly, between pages 23 and 49 of Mr. TAYLOR's memorial to Congress, which is available to everybody as Senate Document No. 461 of the 60th Congress, 1st session, will be found, to quote its zealous editor, "the epoch-making document of February 16, 1783, in which is embodied the first draft of the existing Constitution of the United States," the document which entitles its author, Pelatiah WEBSTER, to be regarded as "the architect of our Federal Constitution." Further along Mr. TAYLOR adds: "Strange indeed it is that the most important document connected with our Constitutional history should now be presented to the jurists and statesmen of the United States as if it were a papyrus from Egypt or Herculaneum."

But of course Mr. TAYLOR's general case for WEBSTER is com-

pounded of more specific claims, which it is our business to review in detail. The first of such claims is that WEBSTER was the first to propose that the Federal Government should have "the independent power to tax," that before him "no one had dreamed of a Federal State with the independent power of taxation," that this proposition "made all possible," involving "the creating of a distinct and self-sustaining Federal Government such as has never existed."¹

But what are the facts? WEBSTER's proposition to invest "the supreme authority" of the Union with "power of taxation," meaning by that the power to levy import duties, which he urged should be particularly heavy upon articles "consumed by the rich or prodigal part of the community," occurs on page 26 of Senate Document Number 461. On that very page WEBSTER himself refers to the recent action of Rhode Island in rejecting an amendment to the Articles of Confederation by which Congress was to be given the power to levy a 5% import duty! This amendment was first proposed in February, 1781, and so antedates WEBSTER's pamphlet an even two years. Even earlier, moreover, was HAMILTON's famous letter of September 3, 1780, to James DUANE urging a "solid coercive union," a powerful executive consisting of few heads, a federal revenue, a tax in kind, and a national bank. Mr. TAYLOR is perfectly aware of this letter of HAMILTON's but sets it down as of "no importance" on account of its private character. "It was not a public act, not even a public declaration," he says. But is this a valid line of argument? Rather, should not such a letter be regarded as something of an index to its author's general interests and conversation, and therefore of those of the group in which he moved? *A priori*, this would seem to be the case, and that it actually is, is proved by the very sentence with which the letter opens: "Agreeably to your request and my promise, I sit down to give you my ideas of the defects of the present system and the changes necessary to save us from ruin." Furthermore, as the editor of HAMILTON's writings points out, at least one of the specific proposals contained in the letter in question, one namely with regard to single executive officers, resulted in the plan from the Congressional committee of which DUANE was a member, establishing a Department of Foreign Affairs with a Secretary. This occurred in January 1781, many months before WEBSTER had conceived his pamphlet.

Mr. TAYLOR's second claim for WEBSTER is that he first proposed the extension to the Federal Government of the principle of checks and balances and the separation of powers. His language is as

¹ Evening Post, Wednesday, Jan. 10th, 1912.

follows: "No one had dreamed of a Federal Legislature divided into two chambers; no one had dreamed of a Federal State divided into three departments; executive, legislative and judicial."

The answer to this claim is two-fold. In the first place, what Mr. TAYLOR asserts "no one had dreamed of," had, on the contrary, been a matter of discussion and deliberation, and that at the very foundation of the Union. Ultimately, however, John ADAMS informs us² the principle of separation of powers was not extended to "the United States in their federal capacity," because "the people of America and their delegates in Congress were of opinion that a single assembly was in every way adequate to the management of all their federal concerns:" and he adds that this was a reasonable decision, "because Congress is not a legislative assembly * * * but only a diplomatic assembly." But now, it is worth noting, as bearing on the whole question of WEBSTER's merits as a political thinker, that, while he did indeed propose to divide Congress into two houses,³ it never occurred to him to alter the real source of mischief, namely Congress's appointment by and responsibility to the States. In short, Congress is still to remain a diplomatic assembly in which the States shall be represented, precisely as under the Articles of Confederation, by delegates "appointed by the States in any manner they please" and subject to recall by the States "as often as they please."⁴

But in the second place, aside from this anomalous proposition to divide a diplomatic body into two chambers, which, in the case of their being unable to agree in the face of a crisis, were to bestow all their powers upon a dictator after the Roman model,⁵ WEBSTER had not the faintest idea of applying the doctrine of the separation of powers to the Federal Government. True, like HAMILTON before him, he would have a collegiate executive, a "Council of State," but this council was to be appointed, certainly in part, probably in entirety, by Congress,⁶ to which moreover "all and singular of them" were to be "ever accountable." As to the part that this council was to have in legislation, WEBSTER writes thus: "*I do not mean to give these great ministers of State a negative on Congress, but I mean to oblige Congress to receive their advices before they pass their bills, and that every act shall be void that is not passed with these forms.*"⁷ In view of this very specific language how

² Life and Works IV, 579, also 208.

³ Senate Document No. 461, 60th Congress, p. 33.

⁴ Ibid. p. 27.

⁵ Ibid. p. 42.

⁶ Ibid. p. 43.

⁷ Ibid. p. 37.

strange that Mr. TAYLOR should write thus: "Under WEBSTER'S plan, *now in force*, federal legislation is enacted by three bodies—the executive, the House of Representatives and the Senate. The President of the United States is a part of the law-making power. *That is what WEBSTER said, no more, no less!*" One wonders with what sort of magic spectacles Mr. TAYLOR reads.

Mr TAYLOR'S third claim in his hero's behalf is the most posterous of all. Stated in his own language it runs thus: "He outlined the Supreme Court with jurisdiction both original and appellate," he anticipated "the splendid conception of the Supreme Court as it now exists," he "provided for the complete supremacy of federal law" and "paved the way for MARSHALL'S great judgment in *Cohens v. Virginia*."

What is the basis for these sweeping assertions? It is supplied by the following passage from WEBSTER'S pamphlet: "That the supreme authority should be vested with powers to terminate and finally decide controversies arising between different States, I take it, will be universally admitted, but I humbly apprehend that an appeal from the first instance of trial ought to be admitted in causes of great moment, on the same reasons that such appeals are admitted in all the States of Europe."⁸

The first point to be made clear in this reference is the meaning of the term "the supreme authority." Obviously, it is the same "supreme authority" for which already⁹ WEBSTER has urged the right to levy a customs duty; again it is the same "supreme authority" for which in the paragraph immediately following the one just quoted from he claims the "power of peace and war, and forming treaties:" it is, in short, Congress.¹⁰ Secondly, it should be observed that WEBSTER himself claims no credit for originality in urging that Congress should have power to terminate controversies between different States; and his modesty in this respect is very becoming, since by Article IX of the Articles of Confederation, Congress was already possessed of precisely this power. Lastly, it should be noted that the phrase "causes of great moment" is explained by the clause immediately following, "on the same reasons that such appeals are admitted in all the States of Europe." I had never heard it suggested before now, however, that the Supreme Court was to be found outlined in the European systems of 1783. But the fact probably is that the definite thing which WEBSTER had in mind was a more effective system of appeals from the State admiralty courts

⁸ Ibid. p. 31.

⁹ Ibid. p. 26.

¹⁰ Ibid. p. 33.

to the Court of Appeals in cases of capture, which Congress had established early in 1780. The jurisdiction of this court had been allowed to be pared down by conditions imposed by the States, to remedy which situation recommendations were under debate in Congress more than a year before WEBSTER's pamphlet left the printing press.

But not only would Mr. TAYLOR have it that WEBSTER proposed the Supreme Court with its present jurisdiction, but also that he prevised the entire federal judicial system. Thus on page 18 of the Memorial to Congress he writes as follows: "After an elaborate discussion of the qualifications of members of Congress * * * he proceeded to define a part of the original jurisdiction of the Supreme Court of the United States by saying 'that the supreme authority should be vested with power to terminate and finally decide controversies between different States.' He also said 'to these I would add judges of law and chancery.' Thus the entire federal judicial system was distinctly outlined."

Mr. TAYLOR's endeavor to identify WEBSTER's "supreme authority" with the present Supreme Court has been already disposed of. Our interest at this point is in the second one of the sentences just quoted. What is the significance of the word "these" in this sentence, to whom does it refer? Mr. TAYLOR's obvious intention is to convey the impression that it refers to the "supreme authority," that is, as he would have it, the Supreme Court. As a matter of fact, however, when we turn to WEBSTER's pamphlet we find "these" separated from the antecedent which Mr. TAYLOR provides for it by more than five pages,¹¹ and that the antecedent which WEBSTER supplies has nothing to do with the "supreme authority," but refers to those Ministers of State who were to constitute his council of legislative revision. "To these," he writes, "I would add judges of law and chancery, but I fear they will not be very soon appointed." In other words, the very sentence from which Mr. TAYLOR presumes to quote in support of his proposition that WEBSTER foresaw the federal judicial system, proves precisely the contrary. It would seem that Mr. TAYLOR's idea of history is, that while some sort of document is necessary to render it plausible, yet given your document you may construct your history to suit your fancy.

But, returning to the subject before us, with WEBSTER's federal judiciary thus vanishing in the thin air of illusion, what becomes of Mr. TAYLOR's further claim that he conceived the idea of a "supreme law of the land" enforceable by that judiciary? The truth

¹¹ Ibid. pp. 31 and 36.

is of course that WEBSTER never even distantly approached such a conception. It is true that he would give the "supreme authority" "sufficient powers to enforce the obedience of all subjects of the United States" to its treaties¹² and "to punish all transgressors in all these respects,"¹³ but what is the method he relies upon for making good these powers of enforcement? He sets it forth on page 45 of the published pamphlet thus: "I therefore propose, that every person whatever, whether in public or private character, who shall, by public vote or overt act, disobey the supreme authority, shall be amenable to Congress, shall be summoned and compelled to appear before Congress, and, on due conviction, suffer such fine, imprisonment, or other punishment, as the supreme authority shall judge requisite." This, from "the Architect of the Federal Constitution," who, according to Mr. TAYLOR, "proposed the division of a Federal State into three departments, executive, legislative, and judicial, *the organization of each of which he worked out*!"

However, we must look at this proposition of WEBSTER's from another point of view, namely, as a proposal to make the federal power operative upon individuals, without the intervention of the States, which, according to Mr. TAYLOR, was yet another, indeed the most fundamental of WEBSTER's discoveries. Thus, in his letter memorializing Congress "in behalf of the Architect of our Federal Constitution," Mr. TAYLOR writes thus: "Having thus defined his fundamental concept of a federal government *operating directly on the citizen*, the great one boldly accepted the inevitable corollary that such a government must be strictly organized and equipped with * * * all the usual apparatus of a government, *all bearing directly upon every citizen of the United States without any reference to the government of the several States.*"¹⁴ But now what is the fact of the matter? It is that WEBSTER had not the least idea of dispensing with the State Governments as the *usual* intermediaries between the government of the Union and its subjects. Thus, while vesting Congress with a customs revenue, he still retains State requisitions.¹⁵ Again, his notion of hailing persons before Congress for transgressing the acts of the Union is devised principally, it seems plain, with the idea of punishing members of the State legislatures for voting measures opposed to the "supreme authority." But finally, it is upon State coercion that he relies principally for securing the authority of the Federal Government.¹⁶

¹² Ibid. p. 31.

¹³ Ibid. p. 32.

¹⁴ Ibid. p. 16.

¹⁵ Ibid. pp. 30, 43.

¹⁶ Ibid. pp. 43-7.

Thus he writes: "There remains one very important article still to be discussed, namely, what methods the Constitution shall point out to enforce the acts and requisitions *through the several States; and how the States which refuse or delay obedience to such acts and requisitions shall be treated.*" And again: "to leave all the *States* at liberty to obey" the acts of Congress "or not with impunity, is, in every view, the grossest absurdity." And again: "every *State* in the Union is under the highest obligation to obey the supreme authority of the whole." And again: "I cannot therefore admit, that the great ends of our Union shall lie at the mercy of a single *State*, or that the energy of our government should be checked by a single disobedience." What he proposed, accordingly, was this: first, that any State might petition Congress for the repeal of any law or decision, and that if a majority of the States did so propose, the law or decision in question should be repealed, but secondly, that "if the execution of any act or order of the supreme authority shall be opposed by force in any of the States * * * it shall be lawful for Congress to send into such State a sufficient force to suppress it."

In other words, under WEBSTER'S scheme, as under the Articles of Confederation, the States still remained the essential units of the federal government, and the supremacy of the federal authority was to be secured by State coercion. But with reference to State coercion, there are just these two facts to be remembered: first, that the idea was not original with WEBSTER, having been proposed as early as March 1781, by a committee of Congress itself, the spokesman of which was MADISON; secondly, that the idea was utterly repudiated by the Convention that framed the Constitution, as impracticable and destructive and, under the system before the Convention, unnecessary. And yet Mr. TAYLOR asserts that WEBSTER'S pamphlet furnished the Convention of 1787 "the basis of its proceedings!"

One point further. In his recent book on THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION, as always earlier, Mr. TAYLOR has endeavored to secure for WEBSTER the credit for a pamphlet written in 1781 in which, HAMILTON'S letter to DUANE aside, the proposition of a continental convention for the purpose of enlarging the powers of Congress was first broached. Mr. TAYLOR bases this claim upon the testimony of MADISON, given late in life. This testimony, however, the historian BANCROFT specifically rejects: first, because, when at a later period WEBSTER collected his pamphlets in a volume, he did not include the pamphlet in question; secondly, because the style of the pamphlet is totally

unlike that of the rest of WEBSTER's writings; thirdly, because the bill for the printing of the pamphlet was made out to one William BARTON; fourthly, because "BARTON from time to time wrote pamphlets, of which on a careful comparison, the style, language and forms of expression are found to correspond to this pamphlet published in 1781." Notwithstanding this convincing array of reasons, Mr. TAYLOR has the hardihood in a footnote¹⁷ to write thus: "No attention should be paid to BANCROFT's vain attempt to discredit MADISON's statement * * * MADISON was on the ground and knew the facts; BANCROFT's inference is based on flimsy hearsay nearly a century after the event!"

All in all, it is amply apparent that Mr. TAYLOR's case for his hero is a pretty footless affair; and on *a priori* grounds merely it would have been regarded as such from the outset, by a really cautious scholar. For while rural churchyards may shelter now and then a "mute, inglorious Milton," it seems extremely unlikely that a period in which both the minds of men and the printing-press fairly teemed with schemes of political and constitutional reform, would have relegated a really superior thinker along these lines to an undeserved oblivion. Rather such a period would have provided its leading genius with a platform and pedestal, as in fact it did for MADISON, HAMILTON and others. But such a leading genius, Pelatiah WEBSTER, with his desultory, whimsical, at points fantastical, pamphlet of February 16th, 1783, decidedly was not; nor could anyone have well convinced himself to the contrary who had not, from strained efforts at comparison between this pamphlet and the Constitution induced a mental astigmatism that has come finally to merge the two documents in a meaningless blur.

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¹⁷ The Origin and Growth of the American Constitution, p. 27.